IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 15TH MAY 2007 / 25TH VAISAKHA 1929

OP.No. 11564 of 1999(B)

PETITIONER:

PAILY PILLAI & SONS,
PERUMPILLIL BUILDINGS,
KOLENCHERY – 682 311,
A PARTNERSHIP FIRM REGISTERED UNDER
INDIAN PARTNERSHIP ACT REPRESENTED BY ITS
MANAGING PARTNER PAILY PILLAI,
S/O.MATHEW, NOW RESIDING AT PERUMPILLIL HOUSE,
KOLENCHERY.

BY ADV. SRI. JOSE TOM

RESPONDENTS:
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1. **THE EXECUTIVE ENGINEER,**
   IDAMALAYAR IRRIGATION PROJECT, ANGAMALY.

2. **SUPERINTENDING ENGINEER,**
   PROJECT CIRCLE, MOOVATTUPUZHA.

3. **THE CHIEF ENGINEER, PROJECT II,**
   THIRUVANANTHAPURAM.

4. **THE SECRETARY,**
   IRRIGATION DEPARTMENT,
   GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER for R1 - R4
BY ADDL.ADV. GENERAL SRI.VENGANOOR CHANDRASEKHARAN NAIR

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 06/11/2006, THE COURT ON 15/05/2007 DELIVERED THE FOLLOWING:

ORDER ON CMP.NOS.21231/1999, 29125/1999, 20054/2000 ,30216/2000 AND C.M.P.NO.21715/2001 IN O.P.NO.11564/1999 B

DISMISSED

15/05/2007 **SD/- PIUS C.KURIAKOSE,JUDGE**

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE SPECIMEN OF THE TENDER CONDITIONS.**

EXT.P2: **COOPY OF THE SUPPLEMENTAL AGREEMENT NO.1 DTD. 29/03/94.**

EXT.P3: **COPY OF THE ORDER PASSED BY HIGH POWER COMMITTEE 30/08/04.**

EXT.P4: **COPY OF THE SUPPLEMENTAL AGREEMENT NO.2(A) DTD. 4/1/95.**

EXT.P5: **COPY OF THE ORDER DTD. 8/03/96 PASSED BY HIGH POWER COMMITTEE.**

EXT.P5(A); **AGREEMENT DTD. 29/03/96 ENTERED EXECUTED BY THE PETITIONER EXTENDING THE TIME OF WORK TILL 31/05/97 AT THE ENHANCED RATE OF 80% OVER THE 1992 SCHEDULE.**

EXT.P5(B): **COPY OF THE 2ND RESPONDENT ON THE BASIS OF THE EXHIBIT P6 AND P5(A).**

EXT.P6: **COPY OF THE REPRESENTATION DTD. 4/11/96.**

EXT.P7: **COPY OF THE ACCOUNT STATEMENT.**

EXT.P8: **COPY OF THE LETTER DTD. 26/09/96 SENT BY 2ND RESPONDENT.**

EXT.P9: **COPY OF THE LETTER DTD. 11/10/96 ISSUED ASSISTANT EXECUTIVE ENGINEER, BHOOTHATHANKETTU.**

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EXT.P10: COPY OF THE LETTER DTD. 29/11/96 ISSUED BY THE PETITIONER.

EXT.P11: COPY OF THE LETTER FROM 1ST RESPONDENT TO 2ND RESPONDENT DTD. 28/05/97.

EXT.P12: COPY OF THE LETTER DTD. 14/05/97 ISSUED BY THE 4TH RESPONDENT.

EXT.P13: COPY OF THE LETTER FROM 2ND RESPONDENT TO THE 3RD RESPONDENT DTD. 07/01/97.

EXT.P14: COPY OF THE LETTERE FROM PETITIONER TO 3RD RESPONDENT DTD. 30/10/96.

EXT.P15: COPY OF THE LETTER FROM PETITIONER TO 2ND RESPONDENT DTD. 29/11/96.

EXT.P16: COPY OF THE LETTER FROM PETITIONER 2ND RESPONDENT DTD. 29/05/98.

EXT.P17: COPY OF THE ORDER DTD. 7/04/99 PASSED BY THE 4TH RESPONDENT.

C.M.P.NO.21231/1999:

EXT.P18: COPY OF THE ORDER PASSED BY THE 2ND RESPONDENT DTD. 10/05/99 SENT ON 14/05/99.

EXT.P19: COPY OF THE POSTAL COVER SHOWING THE DATE OF POSTING OF THE ABOVE LETTER DTD. 10/05/99.

EXT.P20: COPY OF THE ORDER PASSED BY THE 4TH RESPONDENT ON 12/05/99.

C.M.P.NO.59720/2000:

EXT.P18: " COPY OF THE ORDER DTD. 10/05/99.

EXT.P19: " COPY OF THE COVERING LETTER.

EXT.P20: " COPY OF THE ORDER OF THE 4TH RESPONDENT.

O.P.NO.11564/1999 B

EXT.P21: COPY OF THE SALARY VOUCHERS (C.M.P.NO.59720/2000)

EXT.P21: COPY OF AGREEMENT DTD. 4/01/95.

EXT.P22: COPY OF THE LETTER DTD. 16/10/95 FROM THE 4TH RESPONDENT TO THE CHIEF ENGINEER.

EXT.P22: COPY OF THE ACCOUNTS LEDGER FOR THE MAINTENANCE OF THE SHEDS.(C.M.P.NO.59720/2000)

EXT.P23: COPY OF THE CERTIFICATE ISSUED BY BANK.(C.M.P.NO.59720/2000)

EXT.P23: COPY OF THE PAPER PUBLICATION IN MALAYALA MANORAMA DTD. 1/03/2000. (C.M.P.NO.20054/2000:)

EXT.P23: COPY OF THE LETTER DTD. 26/04/2000.

EXT.P24: COPY OF SALARY VOUCHERS.

EXT.P25: COPY OF RELEVANT PAGES OF THE ACCOUNT LEDGER.

EXT.P26: COPY OF CERTIFICATE ISSUED BY THE FEDERAL BANK LTD.\ DTD. 12/12/2000.

EXT.P27: COPY OF THE LETTERS DTD. 12/12/2002 ARE PRODUCED HEREWITH AND MARKED AS FOR IDENTIFICATION.

EXT.P28: COPY OF WHICH IS PRODUCED HEREWITH AND MARKED AS FOR IDENTIFICATION DTD. 09/06/2004.

4TH RESPONDENT'S EXHIBITS:

EXT.R4(A): COPY OF THE LR. DTD. 27/07/93.

EXT.R4(B): COPY OF THE LR. DTD. 10/09/93.

EXT.R4(C): COPY OF THE LR. DTD. 16/11/93.

EXT.R4(D): COPY OF THE UNDERTAKING.

/TRUE COPY/

KSS

PIUS C. KURIAKOSE,J.

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O.P.No.11564 of 1999

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Dated this the 15th day of May, 2007

JUDGMENT

This Original Petition has been filed by M/s.Paily Pillai & Sons, construction contractors to the State for the execution of works relating to two sets of canals from Ch.600 to 1000 M and from Ch.1000 to 1350 M coming within the Idamalayar Irrigation Project. The firsts respondent is the Executive Engineer, 2nd and 3rd respondents are the Superintending Engineer and the Chief Engineer respectively. The 4th respondent is the Secretary, Irrigation Department.

2. Ext.P1 is copy of the tender notice along with tender conditions dated 10.12.1990 in respect of the canal works in question. Following Ext.P1, two agreements numbered 42 and 43 both dated 10.12.1990 with completion period of 36 months expiring on 1.2.1994 and 9.2.1994 were executed between the parties. In the case of the first agreement, the agreed rates are 16.2% above the P.W.D.Schedule of rates 1990 and in the case of 2nd agreement the rates were 17.1% above the P.W.D.Schedule of rates. The petitioner claims to have commenced the work as scheduled, and that during the period referred to in the Original Petition as the first period of work,

heavy machineries were brought to the site and Trenches were dug around the workers' quarters since the entire terrain was conjested with wild animals. The petitioner submits that after commencement of work they were facing grave problems in the form of labour strikes and also natural causes. There were several labour strikes. The first labour strike commenced on 15.4.1991 and continued till 30.11.1991. Again from 11.1.1993 the workers struck work demanding higher wages. The petitioner on 13.5.1993 made a request for revision of wages and for extension of time. Thereafter on 16.7.1993 at the level of the Ministry a meeting was called. All the issues were sorted out in that meeting which was attended by the then Minister for Irrigation also. The petitioner claims that he was assured of revision of rates for the remaining works following the agreement regarding revision of wages for workers which was arrived at in the above conciliation meeting. Thereafter the work was commenced on 15.12.1993. For the purpose of facilitating the continuance of the work which recommenced on 15.12.1993, a further extension of time was necessary and accordingly supplemental agreement Ext.P2 was executed, pending consideration of the revision of rates on the basis of the proceedings of the Superintending Engineer dated 29.3.1994. The period for completion

of the work was accordingly extended upto 31.7.1995. A High Power Committee was constituted for considering the petitioner's request for revision of rates. The High Power Committee considered the various aspects of the matter and minuted several reasons for granting enhancement of rates to the petitioner. The Government accordingly passed Ext.P3 order referring to the meeting of 16.7.1993 and accepting the recommendation of the High Power Committee allowing 35% above 1992 schedule of rates for the remaining parts of the work to be done in both the reaches. Under Ext.P3 the Government accepted the recommendations of the High Power Committee and extended the time for completion of the work by one and half years being the time lost on account of labour and other problems. Upon Ext.P3 order being passed a supplemental agreement Ext.P4 was executed cancelling Ext.P2 agreement. The petitioner contends that in view of Ext.P4 in effect Ext.P2 ceased to exist. While the work was being carried on on the basis of Ext.P4, bills were also issued and amounts were also paid. But after paying two bills as per Ext.P3, payment of further bills at revised rates was stopped. The dispute raised by the Department was whether the revised rates were payable from 30.8.1994, i.e. the date of Ext.P3 order or from 15.12.1993, the

date when the work is commenced. According to the petitioner, the contention of the respondents was per se unsustainable. While so, heavy monsoon set in and work had to be stopped since some of the areas were washed away due to landslide and work has to be redesigned necessitating new constructions also. A High Power Committee was constituted in view of these developments and a decision to redesign the work as per the recommendations and to pay revised rates at 80% of 1992 schedule rates was recommended. Ext.P5 Government Order was passed accepting the recommendations of the above High Power Committee. On the basis of Ext.P5 supplemental agreement Ext.P5(a) was executed and Ext.P5(b) is the proceedings of the Superintending Engineer issued in that regard. Agreements similar to Exts.P5(a) and proceedings similar to Ext.P5(b) were made regarding the other chainage also. Pointing out that the Government itself has revised the P.W.D.Schedule of rates by 40% above the 1992 rates, the petitioner submits that in view of the above revision of rates the benefits actually allowed to the petitioner under Ext.P5 was only 5%. Petitioner points out that it is made clear in Ext.P5 order that the excess over 1990 schedule of rates and further enhancement of rates will cease to exist from the date of

implementation of the new rate. Petitioner high lights that the High Level Committee had made its recommendations noticing that since the original contractor had not completed his work, a) it will not be possible to terminate the work b) the arrangement of work through any other agency will consumed time and c) the present contractor is well equipped with all the infrastructural facilities in the site for the completion of the work and that the Committee after considering all aspects of the matter in detail found that re-tendering of works will result in the rates going up very high and the Government also decided under Ext.P5 to accept the recommendations of the High Level Committee after examining the matter in detail. Petitioner submits that following Ext.P5 one bill was paid at the revised rates. Thereafter the dispute was raised by the authorities that revised rates were applicable only for the work for the re-designed areas and not for work carried out as per the old design/plan. Thereupon the petitioner submitted several representations and Ext.P6 is copy of the representation dt.14.11.96 requesting for release of payment at the revised rates and also seeking issuance of clarification, if any, which had been sought for by the respondents. The petitioner claims that various items of correspondence between the petitioner and the

respondent would show that the petitioner's case was bonafide and that the authorities were unnecessarily delaying issuance of clarification regarding the effective date of operation of Exts.P3 and P5 and that this has resulted in delaying the execution of the work itself. The claim of the petitioner is that amounts correctly due to the petitioner under Exts.P3 and P5 is Rs.80.27 lakhs, as detailed in Ext.P7 which is copy of a statement. Petitioner claims that as per Ext.P3 for the period from 15.12.93 till 31.07.95 respondents are bound to pay amounts as per revised rates and that as per Ext.P6 for the period from 08.03.96 till date of stoppage of work also, the petitioner is entitled for payment at revised rates. Major difficulties and re-designing of work was caused due to the natural calamities and the correspondences also point out the speedy attention in the matter called for, since every monsoon would further escalate the cost. But the petitioner alleges that over looking of these factors pointed out by their own officers, respondents slept over the issue. Ext.P8 which is copy of a letter dt.26.9.96 issued by the Superintending Engineer is relied on by the petitioner in this regard. Ext.P9 copy of letter dt.11.10.96 issued by the Assistant Executive Engineer, Bhoothathankettu to the 1st respondent Executive Engineer

is relied on to show that part of the payment was done at 35% excess as per Ext.P3 for works up to 31.07.95 and the petitioner's notice for stoppage of work. Ext.P10 which is copy of a letter dt.29.11.96 issued by the petitioner to the 1st respondent-Superintending Engineer informing that work cannot be continued due to non-payment is also relied on. Ext.P11 copy of letter dt.28.05.97 from the 1st respondent-Executive Engineer to the 2nd respondent, Superintending Engineer is produced to demonstrate the "recalcitrant delaying red tapism" procedures adopted by the respondents. Petitioner submits that for a small matter in issue which has been pending to be clarified since 1994 the respondents had not issued clarification even in 1997 in spite of several notices for stoppage of work issued by the petitioner. Petitioner relies also on Ext.P12 letter dt.14.05.97 issued by the 4th respondent-Government Secretary to the Chief Engineer as a document bringing out the further apathy of the respondents in the matter. It was in reply to Ext.P12, that Ext.P11 was sent and it is submitted that in spite of Ext.P11, the 4th respondent did not take any action. Petitioner points out that all these time supplemental agreements as per Ext.P3 was alone executable and the work was carried out on that basis under the supplemental agreements and

Ext.P5. Ext.P13, copy of letter dt.07.01.1997 from the 2nd respondent to the 3rd respondent is relied on as document throwing light on the delay caused by respondents. Petitioner complains that from the date of stoppage of work and thereafter men and machinery and equipment of petitioner is lying idle at the site causing heavy damage loss to the petitioner and submits that he is entitled for damages/compensation for the same. Ext.P14, copy of letter dt.30.10.96 and Ext.P15 copy of letter dt.29.11.96 issued by the petitioner for stoppage of work are relied on. It is submitted that the above and various correspondences sent to the respondents regarding stoppage of work fell on deaf ears and reliance is placed also on Ext.P16 copy of letter dt.25.05.98. Op No.14467 of 1998 was filed by the petitioner and that Original Petition was disposed of directing the 4th respondent-Secretary Irrigation to take a decision within two months. On 07.04.99 the 4th respondent passed an order cancelling the contract with the petitioner seeking a re-tender of work at the risk and cost of the petitioner. Ext.P17 is copy of the said order. The Writ Petition is instituted impugning Ext.P7 on various grounds seeking the following reliefs:

i. call for the files pertaining to the contract work of Ch 650m to Ch 1000m and Ch 1000m to Ch 1350m of Idamalayar Irrigation

Project under the respondents including the correspondences thereon.

ii. Quash Ext.P17

iii. Pass appropriate directions directing the respondents to pay the amounts due as per Ext.P7 calculation statement on the basis of Exts.P3 and P5 with interest at 21% as damages for the delay caused from the dates they became due.

3. On 08.06.99 on behalf of the 4th respondent-Government a statement was filed and thereafter on 24.01.02 a detailed counter affidavit is also filed. It is contended that the site of the work Nos.1 and 2 were handed over to the petitioner respectively on 01.02.91 and 09.01.91 for a period of 36 months for completion and as such the completion period expired on 31.01.94 and 08.01.94 respectively. Petitioner did not complete the works on time. As requested by him on two occasions extension of time was granted by the 2nd respondent. The counter affidavit contends that as contractor, the petitioner is expected to see all aspects of the works including site conditions before he enters into the contract. Labour strikes are an integral part of all construction activities of every project in Kerala and it was duty of the petitioner to sort out the labour strike and such other contingencies and the petitioner is not entitled to make claims against

Government on account of time loss due to labour strike. The petitioner is bound by the terms of the agreements and supplemental agreements executed by him. Even after the settlement of terms on 16.07.93 he commenced the work only on 15.12.1993, wasting good working season from July to December in the project. The delay in execution of the work was due to slackness and callousness on the part of the petitioner himself who was dragging the work under one pretext or another , despite repeated notices from the respondents. Exts.R4(a),R4(b), R4(c) letters issued to the petitioner are relied on. On the terms of the agreements Government is not bound to make good the loss of work in season due to labour disputes and climatic conditions. Under settlement agreement No.1 it is specifically agreed that petitioner will not claim enhanced rates during the extended time of completion. But in order to ensure early completion of work based on the recommendations of the high level committee the Government granted extension by 18 months by Ext.P3 order to compensate the working season lost due to labour strike and monsoon and for the same reason the Government decided under the same order to grant 92 schedule of Rate plus 35% excess over the estimate for the balance work. Even after the above extension, petitioner could not complete

both the works.

4. It is contended that since supplemental agreement NO.I extending completion time upto 31.7.1995 was executed on 29.3.1994, which is before passing Ext.P3 order, the contention that supplemental agreement No.I is not sustainable is without merit. The agreement which is cancelled is not supplemental agreement No.I produced as Ext.P2. On the contrary, the cancelled agreement is agreement No.II dated 4.1.1995, which has not been produced as an exhibit. The petitioner is trying to mislead this court. Time extension upto 31.7.1995 was granted in Ext.P2 and not under Ext.P4 as the petitioner states. The allegation that payments were not being made is denied and it is stated that while the work was being carried out, payments were being made for measured quantity subject to the condition that for excess or shortage of payment, usual adjustments will be made in the subsequent bills. It is then contended that Ext.P5 order dated 8.3.96 was issued by the Government granting enhanced rate of 80% excess over 1992 schedule of rates for carrying out the balance works as per the revised design and for removing the extra earth on canal realignment. By that time, time extension for completion of work stood already granted upto 31.7.1995. Under

Ext.P5, the enhanced rate (80% over 1992 schedule) can be paid only for the work done as per the revised design and also for extra earth work necessitated due to slipping of sides. But the demand of the petitioner is that he should get enhanced rates for the entire balance works. This is not agreeable, since new rate becomes operative only when work, which have already been agreed to be executed by 31.7.1995, is completed. For all such original works, the applicable rate is 1990 schedule of rates and its tender excess 17.1% and 16.2%, as the case may be. It is contended that the department was justified in terminating the work at the petitioner's risk and costs, since he, despite being equipped with machineries and infrastructural facilities, did not complete the work within the extended time even.

5. It is then contended that the committee considered the option of re-tendering the work as per the revised design and removal of earth and not re-tendering of the original work. The petitioner alone is to be blamed for not completing the original work even within the extended time. It is, therefore, contended that revised rates as per Exts.P3 and P5 will not become operative for the original work since Ext.P2 [supplemental agreement No.I], which is not cancelled, contains a condition that no enhancement will be given and Ext.P2 has

never been cancelled. The counter affidavit justifies the stoppage of payment on the reason that the work had come to a stand-still and that the payment at the enhanced rate at 80% was applicable only for the balance works as per the revised design and to the removal of earth on cancellation and re-alignment. This court in the judgment in O.P.No.14467/98 only directed taking of an early decision on the request of the petitioner and appropriate orders to be passed on his representations for giving effect to Exts.P3 and P5. Since the petitioner was a defaulter of works, the revised rates as requested in his representation, could not have been given.

6. The counter affidavit takes very strong exception to the claims based on Ext.P7 calculation statement. His challenge against Ext.P7 is totally unrealistic. Ext.P7 is not an official document and the figures are only tentative figures. The same contains duplication of figures. Exact figure can be got only after assessing the final measurement and liabilities of the works. It is, however, stated that the dispute is regarding the rates applicable for the work done during each period and that there is no dispute regarding the measurement. It is claimed that up-to-date payments have been made on the basis of the agreement conditions and the counter affidavit contains a

schedule of interim payment details regarding the work No.I as well as Work No.II. Works are presently in incomplete stage and hence the work was cancelled at the petitioner's risk and final settlement can be made only after the work is re-arranged and excess loss is determined. The counter affidavit goes on to deny the averments in the original petition paragraph wise and contends that the petitioner is not entitled for any relief at all. Time of completion was fixed, taking into account the monsoon season and considering its working season. The Government granted many concessions to the petitioner, but still, the work remains incomplete as the petitioner was not ready to carry out the work as agreed to by him. Exts.P11, P12, and P13 letters are described as part of the decision making process and to study the progress of the work. The petitioner was bound to complete the work without waiting for the outcome of the departmental procedure. It is contended that all machineries which have been brought to the site by the petitioner, except one compressor which was not in working condition and needed repairs, were taken back by the petitioner immediately after stoppage of the work. The man power idling at the site is only two watchmen. The claim of loss due to idling of men and machinery is exaggerated.

7. The direction of this court in O.P.No.14467/98 was that the Irrigation Secretary shall take a decision on the representations of the petitioner within two months. In the meanwhile, High Power Committee constituted by the Government, which consisted of respondents 2 and 3, also studied the entire aspects and suggested a course of action for completion of the work. The Government accepted the recommendations of the High Power Committee and the Government decision was communicated to the Chief Engineer, who was directed to take immediate action. The court's judgment has been complied with in all respects. Ext.P17 order was passed by the first respondent in compliance with this court's directions and Ext.P18 is issued by the 2nd respondent on the basis of Ext.P17. The petitioner's contention that respondents have not complied with the directions of this court is without any basis. In Exts.P3 and P5, the Government has clearly stipulated that the revised rates will be applicable only for the balance works to be executed as per the revised design and stoppage of work by the petitioner was with the mala fide and deliberate intention of pressurising the Government to yield to his undue benefit from the proposals. Ext.P17 was the result of action taken on the basis of the petitioner's request at various levels of the

Government and considering various aspects put forward by the petitioner in detail and as per the direction of this court in O.P.No.14467/98. The petitioner was bound to complete the work within the time granted. Sufficient opportunity was given to the petitioner to complete the work, but he failed to complete the work. The difficulty encountered in execution was between ch.600 m to 675 m and 1200 m to 1350 m. He could have completed the work, at least, of the remaining reaches within the stipulated time. The site was handed over to him on 1.2.1991 and 9.1.1991 respectively and time was granted upto 31.5.1997. There is no reason to grant time again to him and the work was cancelled at the risk and cost of the contractor. From the very beginning of the contract, the petitioner was showing total disinterest in the matter of completing the work, though the department gave him every possible solution and granted escalation of rates and extension of time. While extending the time for completion, as per his request, he agreed that he will not claim any enhanced rate for the remaining works during the extended period. But he is again demanding enhanced rates. Passing of Exts.P17, P18 and P20 are, therefore, legally sustainable and in the best interest of the public.

8. It is then contended that as per the agreement conditions, the State is not liable to pay any compensation for the maintenance and supervision of the temporary shed constructed by the contractor and Clause No.35 in Form No.83 which forms part of the agreement is relied on. It is pointed out that the petitioner's claim for Rs.1.50 lakhs, on account of the maintenance of the shed is not supported by documents like cash book, ledger or dated voucher. Documents produced as Exts.P21 and P22 are described as cooked up and unauthenticated ones. Ext.P23 certificate issued by the bank regarding interest charged by the bank is described as inadequate. It is contended that being an A category contractor, the petitioner is expected to be financially sound and therefore, his argument that he has borrowed money from bank cannot be admitted. Production of copy of Government's letter No.5513/MP2/98/IRD dated 26.4.2000 of the Secretary to Government, Irrigation Department is severely criticised in the counter affidavit, as unauthorised procurement of Government communication, which is not intended to him. It is alleged that copy of the letter was obtained by the petitioner dubiously and therefore, that letter cannot be relied on at all and the petitioner has to explain as to how he was able to procure the said

interdepartmental communication.

9. Documents Exts.P18 to P23 are produced by the petitioner along with C.M.P.No.59720/00 which is an application seeking amendment of the writ petition and seeking incorporation of additional grounds and substitution of prayers. It is averred that Ext.P17 order was followed by Ext.P18 order dated 10.5.1999 terminating the contract for the works of two reaches of the canal. Ext.P18 was followed by Ext.P20 order passed by the 4th respondent and Ext.P19 is copy of the covering letter against which Ext.P20 was communicated. It is alleged that Exts.P18 and P20 have been passed with oblique motives in an illegal manner. Ext.P21 is copy of the salary vouchers issued by men, who have been engaged for maintaining the sheds constructed at one side and also the machineries belonging to the petitioner. Ext.P22 is copy of the accounts ledger for the maintenance of the sheds. Ext.P23 is copy of the certificate issued by the Federal Bank, Kolencherry, the petitioner's bankers. It is contended that the respondents are bound to reimburse the the above amounts from the stoppage of work, which has been caused only due to laches and default and arbitrary conduct of the respondents. On 16.7.1999, the petitioner has filed a reply affidavit answering statement earlier filed

on behalf of the respondents. It is contended that the wording in Ext.P23 would show that it was to be effective from 15.12.93 onward to recompense the increase in wages also. Ext.P2 had been superseded by Exts.P3, P4 and P5. It was after giving bills at the revised rates subsequent to Ext.P3 that the respondents raised the issue of the Government orders being prospective. The circumstances and evidence produced will show that the hike in rates was assured while the work was started on 15.12.1993. There is no question of interim excess payments having been made by the respondents. The respondents have suppressed the receipts issued by the petitioner for having received the payments subsequent to Ext.P3, which is the revised rate. Non-production of those receipts is deliberate and adverse inference has to be drawn against the respondents. It is for the respondents to prove their contention that payment made at the rates hiked by Ext.P3 are interim excess payments. It is contended that matters for delay in work as well as stoppage of works were admitted by the respondents as justifiable for the delay. The respondents are estopped from contending otherwise. Final stoppage of work was after due notice to the respondents who are not entitled to pay interest on the same. The reply affidavit agrees the execution

of an agreement dated 4.1.1995 for making interim payment pending clarifications. It is contended that it was agreed to disburse the excess rate limited to 50% of the sanctioned rate as per Ext.P3, so as to proceed with the work. Ext.P21 is copy of that agreement dated 4.1.1995. Referring to principles of novation, privity and promissory estoppal, it is contended that Ext.P3 and the agreements thereon superseded supplemental agreement No.I and that supplemental agreement No.2A supersedes supplemental agreement No.I. If revision as per Ext.P5 is not given to the petitioner, the same will amount to denial of general department revision to the petitioner. The revision as per Ext.P5 includes general departmental revision which is at the rate of 40% . The reply affidavit refers to 13 letters written by the petitioner demanding a disposal of clarification and inter alia stating that the work will be stopped if the withheld payments at revised rates are not given and points out that the procedure for clarification started in 1995. Ext.P22, which is copy of the Government letter dated 16.10.1995 addressed to the Chief Engineer under which Ext.P3 is directed to be kept in abeyance is also relied on. It is submitted that Ext.P22 remains in force even now. Ext.P23 is produced along with C.M.P.No.20054/00 which is an application filed by the

petitioner seeking a direction for release of Rs.50 lakhs to the petitioner as an interim payment. Ext.P23 is copy of a Malayala Manorama report, which is relied on to support the petitioner's case that he has invested lakhs of rupees and put up structures (Coolie line for boarding and canteen of the workers) and that machineries worth lakhs of rupees were lying at the site which is inside the Bhoothathankettu reserve area, which is infested with wild animals from the very beginning and that on 28.2.2000 the site was attacked by wild elephants and the coolie line sheds and machineries were attacked in which the structures put up by the petitioner were completely destroyed. It is highlighted that the petitioner had abandoned the work after giving proper notice to the respondents. But Ext.P17 was passed without responding on any of the letters or notice of abandonment (13 numbers).

10. I heard the submissions of learned counsel for the petitioner and those of Mr.Venganoor Chandrasekharan Nair, Additional Advocate General on behalf of the respondents. Learned counsel for the petitioner and the learned Additional Advocate General would make submissions on the basis of the pleadings raised and also the various documents placed on record.

11. The learned Additional Advocate General would rely on the judgment of the Full Bench of this court in **State of Kerala v.T.V.Anil** (ILR 2002(1) Kerala 227) to argue that a writ of mandamus cannot be issued for enforcing obligations on the part of the State arising out of a contract in the present case where the facts are seriously disputed. For the very same proposition, the learned Additional Advocate General relied on the judgment of the learned Single Judge of this court in **Vijayakumaran Nair v. State Bank of Travancore** (2005(1) KLT 953) and that of the Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd**. [(2004) 3 SCC 553]. Learned counsel for the petitioner would try to meet the argument that the Writ Petition is not maintainable by relying on the judgment of the Supreme Court in Aerial International Limited case itself, the judgment of the Supreme Court in **Kan Singh v. S.T.A.Tribunal** (AIR 1988 S.C. 18), the judgment this court in **Harrisons Malayalam Ltd. v. K.S.E.B.** (1988(2) KLT 248), the judgment of the Supreme Court in **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai** [(1998) 8 SCC 1, the judgment of the Constitution Bench of the Supreme Court in **L.Chandra Kumar v. Union of India** [(1997) 3 SCC 261] and that of a learned Single

Judge of this court in **Surabhi Employees Trade Union Congress v. Kerala State Handicrafts Apex Co-operative Society Ltd.** (2002 (2) KLT 77).

12. I have considered the rival submissions in the light of the pleadings and the judicial precedents cited at the bar. I do notice some force in some of the submissions made on behalf of the petitioner. It appears to me that the 4th respondent did not have clear comprehension while issuing Ext.P17 regarding the circumstances under which supplementary agreement No.1 and No.2A produced in the case as Exts.P2 and P4 were executed. Supplementary agreement No.1 was executed so as to facilitate the execution of the works after 15.12.1993 pending revision of rates. But for that supplementary agreement, it could not have been possible for the petitioner to continue the work. Proceedings were under way at the time of execution of the above supplementary agreement for revision of rates. Naturally, the petitioner could legitimately expect that the High Power Committee which was constituted prior to the execution of the supplementary agreement will revise the rates as was later done by Ext.P3 order of the Government accepting the Committee's recommendations for revision of rates. Later, supplementary

agreement No.2A (Ext.P4) was executed cancelling supplementary agreement No.1. It will be difficult to accept the argument of the respondents that revised rates as per Ext.P3 will apply only from the date of the notification. If this argument is accepted, it will have to be seen that no rate will apply for the period from 2/1994 till 8/1994, i.e., from the expiry of Ext.P1 and till passage of Ext.P3. A meaningful reading of Ext.P3 will show that Ext.P3 is to become effective for the whole of the period from 15.12.1993.

13. So also, I find that under Ext.P17, there is a conclusion that higher rates, if any, paid after execution of Ext.P2 (which is referred to in Ext.P17 as agreement No.1), the same can be recovered from the petitioner. The above direction, in my view, is illegal. Ext.P2 supplementary agreement No.1 was in fact substituted by Exts.P3 and P4 and the petitioner was made to execute the work on the basis of Exts.P3 and P4 and some payments were also given to the petitioner as per revised rates. The 4th respondent is not entitled later to turn around and say that Ext.P2 supplementary agreement No.1 is binding on the petitioner. Ext.P17 will show that there was confusion for the respondents as to which agreement was valid and correct while issuing Ext.P17.

14. There, certainly, is some force in the stand taken by the Government, that an experienced contractor like Sri.P.M.Paily Pillai was expected to study the site conditions and foresee the labour problems before entering into the contract and was not justified in taking shelter under labour problems, climatic and terrain conditions for the delay which has been caused in executing the work. I would have accepted the above stand, had it not been for Exts.P3 and P5 Government Orders and agreements Exts.P4 and P5(a), which have been executed by the parties. Exts.P3 and P5 orders were issued by the Government on the basis of recommendations of High Power Committees constituted by the Government for looking into the grievances voiced by the Government. The High Power Committees noticed some genuineness in those grievances and the Government in its wisdom decided to accept the recommendations of the High Power Committees and to grant revision of rates to the petitioner. I have already noticed that the grounds raised by the petitioner regarding the effective date of operation of Exts.P3 and P5 in the matter of applicability of the revised rates cannot be said to be totally unattractive. Nevertheless, I refrain from deciding finally the merits of the matter since I notice that Ext.P17 is not preceded by a personal

hearing of the petitioner. Perhaps, if a personal hearing has been afforded to the petitioner, the Government could have been persuaded to accept, at least, some of the grounds raised by the petitioner. Therefore, I am inclined to quash Ext.P17 on that ground. Since Ext.P17 goes, Exts.P18 and P20, which are in the nature of orders consequential to Ext.P17 have also to go. Quashing Exts.P17, P18 and P20, I relegate the matter back to the Government for a fresh decision. The petitioner is permitted to submit his arguments in writing to the Government. The Government will hear the petitioner and take a fresh decision on the issue covered by Exts.P17, P18 and P20. Fresh decision, as directed above, will be taken at the earliest, at any rate, within 2 months of receiving a copy of this judgment.

(PIUS C.KURIAKOSE, JUDGE)

srd/btt/sk